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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 670

MOTORISTS MUTUAL INSURANCE COMPANY OF COLUMBUS, OHIO, A CORPORATION,

Appellant,

vs.

HARRY HENDERSHOT, ADMINISTRATOR OF THE ESTATE OF ANNA L. HENDERSHOT, DECEASED,

Appellee

JURISDICTIONAL STATEMENT

The appellant is entitled to an appeal by virtue of § 237 of the Judicial Code, Title 28 U. S. C. § 344 and particularly the portion thereof which reads:

> "or where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon appeal."

The statutes of the State of Ohio involved are as follows:

Ohio General Code § 6308-1:

> "Any nonresident of this state, being the operator or owner of any motor vehicle, who shall accept the

privilege extended by the laws of this state to nonresident operators and owners, of operating a motor vehicle, or of having the same operated, within the state of Ohio, or any resident of this state, being the licensed operator or owner of any motor vehicle under the laws of this state, who shall subsequently become a nonresident or shall conceal his whereabouts, shall, by such acceptance or licensure, as the case may be, and by the operation of such motor vehicle within the state of Ohio, make and constitute the secretary of state of the state of Ohio his, her, or their agent for the service of process in any civil suit or proceeding instituted in the courts of the state of Ohio against such operator or owner of such motor vehicle, arising out of, or by reason of, any accident or collision occurring within the state in which such motor vehicle is involved." (115 Ohio Laws 36).

Ohio General Code § 6308-2:

"Such process shall be served, by the officer to whom the same shall be directed or by the sheriff of Franklin county, who may be deputized for such purposes by the officer to whom the service is directed, upon the secretary of state of the state of Ohio, by leaving at the office of said secretary, at least fifteen (15) days before the return of such process, a true and attested copy thereof, and by sending to the defendant, by registered mail, postage prepaid, a like true and attested copy thereof, with an endorsement thereon of the service upon said secretary of state, addressed to such defendant at his last known address. The registered mail return receipt of such defendant shall be attached to and made a part of the return of service of such process." (115 Ohio Laws 36).

Ohio General Code § 6308-5:

"This act shall be construed to extend the right of service of process upon nonresidents and upon residents who subsequently become nonresidents or who

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conceal their whereabouts, and shall not be construed as limiting any provisions for the service of process now or hereafter existing." (115 Ohio Laws 38).

Ohio General Code § 9510-4:

"Upon the recovery of a final judgment against any firm, person or corporation by any person, including administrators and executors, for loss or damage on account of bodily injury or death, for loss or damage to tangible or intangible property of any person, firm, or corporation, for loss or damage on account of loss or damage to tangible or intangible property of any person, firm, or corporation, for loss or damage to a person on account of bodily injury to his wife, minor child or children if the defendant in such action was insured against loss or damage at the time when the rights of action arose, the judgment creditor or his successor in interest shall be entitled to have the insurance money provided for in the contract of insurance between the insurance company and the defendant applied to the satisfaction of the judgment, and if the judgment is not satisfied within thirty days after the date when it is rendered, the judgment creditor or his successor in interest, to reach and apply the insurance money to the satisfaction of the judgment, may file in the action in which said judgment was rendered, a supplemental petition wherein the insurer is made new party defendant in said action, and whereon service of summons upon the insurer shall be made and returned as in the commencement of an action at law. Thereafter the action shall proceed as to the insurer as in an original action at law." (115 Ohio Laws 403).

The judgment of the Supreme Court of Ohio which is sought to be reviewed was announced on the 24th day of July, 1945. Application for rehearing was filed August 2, 1946 and denied—October 1st, 1946. Application for appeal is presented this 1st day of October, 1946.

The principal question in this case involves the constitutionality of the statutes providing for service of process

upon nonresident owners or operators of motor vehicles, (§§ 6308-1 to 6308-5 Ohio General Code; 115 Ohio Laws, 36), as construed by the trial court and affirmed by the Supreme Court of Ohio. The appellant has maintained since its first opportunity to present the question that the operation of the statutes as construed by the trial court and affirmed by the Supreme Court of Ohio, constitute a denial of due process of law and equal protection of the laws in contravention of Section 1 of the XIV Amendment to the Constitution of the United States.

The meaning of a statute as determined by the highest court of the State must be accepted as if specifically in the statute itself. *Morehead* v. *New York ex rel. Tipaldo,* 298 U. S. 587, 56 S. Ct. 918, 80 L. Ed. 1347; *Knights of Pythias* v. *Meyer,* 265 U. S. 30, — S. Ct. —, 68 L. Ed. 885.

As held by the court in *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, 290, 42 S. Ct. 106, 66 L. Ed. 239:

> "Our conclusion on the jurisdictional question is that, as the state court applied and enforced to the plaintiff's disadvantage a state statute which the plaintiff seasonably insisted as so applied and enforced was repugnant to the Constitution and void, the case is rightly here on writ of error."

Therefore, under Section 237(a) of the Judicial Code, 28 U. S. C., 344(a), the judgment is one which may be reviewed by the Supreme Court of the United States upon appeal. *Nashville C. & St. L. Railroad Co.* v. *White,* 278 U. S. 456, 73 L. Ed. 452, 49 S. Ct. 189; *Great Northern Railroad Co.* v. *Minnesota,* 278 U. S. 503, 78 L. Ed. 477, 49 S. Ct. 191.

The federal questions involved in the case are substantial. Prerequisite to a valid judgment against the appellant, Motorists Mutual Insurance Company, is a prior valid judgment against Clarence Ferkel, its insured. Clarence

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Ferkel, on October 10, 1936, while a resident of Sandusky County, Ohio, was driving an automobile when it was involved in an accident. Subsquent to the accident, Ferkel became a resident of the state of California. After he had become a resident of that state the action out of which this appeal arises was filed in the Common Pleas Court of Sandusky County, Ohio. Clarence Ferkel never received any notice of the filing of the law suit against him and had no knowledge that such alleged suit was pending until he read in a newspaper account that a judgment had been entered against him. The evidence in the record is uncontradicted on this point. Subsequent to the alleged judgment against Ferkel, a supplemental petition pursuant to Section 9510-1 *et seq.* General Code of Ohio was filed against the Motorists Mutual Insurance Company, the appellant. Notwithstanding the failure of the insured to receive any notice of the suit against him, the trial court entered judgment against the insurance company. The Supreme Court of Ohio affirming the trial court held that § 6308-2 of the General Code of Ohio was complied with when a copy of the summons served upon the Secretary of State was mailed by registered mail to defendant Clarence Ferkel, although the registered mail envelope was returned to the Sheriff undelivered and marked "Unknown at Address;" and the Sheriff's return specifically so recited, and no registered return receipt of the postal department was filed and made a part of the return. The court further held that the statute as so construed was not "constitutionally invalid."

The holding of the Supreme Court of Ohio is contrary to the holdings of the Supreme Court of the United States. In *Wuchter* v. *Pizzuti*, 276 U. S. 13, 48 S. Ct. 259, 72 L. Ed. 446, 57 A. L. R. 1230, the court held that service upon the Secretary of State without more is a denial of due process of

law. In the case of *Hess* v. *Pawloski*, 274 U. S. 352, 47 S. Ct. 632, 71 L. Ed. 1091, the Supreme Court upheld a Massachusetts Statute which was almost identical to the Ohio Statute but which the court said "required that he shall *actually* receive and receipt for notice of the service and of copy of the process." And in *Kane* v. *New Jersey*, 242 U. S. 160, 37 S. Ct. 30, 61 L. Ed. 222, the court upheld the New Jersey Statute which provided for service by mail to the necessarily known registered address of the defendant. As held by the Supreme Court in *Wuchter* v. *Pizzuti:*

> "Every statute of this kind, therefore, should require the plaintiff bringing the suit to show in the summons to be served the post office address or residence of the defendant being sued, and should impose either on the plaintiff himself or upon the official receiving service or some other the duty of communication by mail or otherwise with the defendant."

The Supreme Court reiterated the doctrine of *Wuchter* v. *Pizzuti* in *State of Washington ex rel. Bond and Goodwin and Tucker, Inc.* v. *Superior Court of the State of Washington for Spokane County*, 289 U. S. 361, 77 L. Ed. 1256, 53 S. Ct. 624, 89 A. L. R. 653 and in *Griffin* v. *Griffin*, — U. S. —, 66 S. Ct. 22, — L. Ed. —.

The appellant has maintained throughout the litigation that Section 6308-1 of the General Code of Ohio insofar as it authorizes service by mail upon a person who has, since the happening of an accident or collision occurring within the State of Ohio, involving the use of a motor vehicle, become a resident of a state other than Ohio is in contravention of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

The statute makes an arbitrary classification of persons who subsequent to a motor vehicle accident become nonresidents of the state. The statute does not attempt to

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make the Secretary of State an agent for service for all residents having automobile accidents within the state; nor does it attempt to make him an agent for service as to other obligations which a person may have incurred while a resident of the state.

The judgment of the Supreme Court of Ohio entered on the 24th day of July, 1946, so construes Sections 9510-1 to and including 9510-4 of the General Code of Ohio as to deny to the appellant Motorists Mutual Insurance Company a right of defense arising from the violation of policy conditions respecting the failure to give notice of claim and to transmit to the insurance company all summons and process in suits commencing against the assured. Notwithstanding, the evidence is uncontradicted on the point that the insurance company received no notice from anyone of the pendency of the litigation until seven days prior to the time of trial, the Supreme Court of Ohio held that there was a question of reasonableness of the notice which was a question of fact for the trial court. The appellant maintains that the judgment of the Supreme Court of Ohio constituted a denial of due process of law.

The federal questions sought to be reviewed were raised, at the first opportunity, by the appellant Motorists Mutual Insurance Company. The first and second questions were raised in its answer to the supplemental petition of the plaintiff filed in the Commmon Pleas Court of Sandusky County, May 16th, 1941 found in the record at page 14 and reading as follows:

> "Said new defendant, Motorists' Mutual Insurance Company, says that if it be held that the allegations of the petition herein authorized the Clerk to issue summons pursuant to said Act, to the sheriff of Sandusky County, Ohio; and if it be held that an action was commenced against the said Clarence Ferkel; and if it be held that the return of the sheriff shows service upon

said Clarence Ferkel within the provisions of said Act, and particularly Section 6308-2 thereof; then said Act is in contravention of Article 1, Section XVI of the Constitution of Ohio, which provides that all courts shall be open and that every person shall have remedy by due course of law; and in contravention of Section I of the XIVth Amendment of the Constitution of the United States, which provides:

"'* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'"

The Common Pleas Court found "the issues in favor of the plaintiff and against the new defendant" (R. 25).

The appellant took an appeal to the Court of Appeals of Sandusky County and among its assignments of error were the following:

"6. The Act of the General Assembly passed in 1933 (115 O. Laws 36) found General Code § 6308-1–6308-5 are in contravention of Article I, Section XVI to the Constitution of Ohio, and in contravention of Section I of the XIV Amendment of the Constitution of the United States, insofar as said Act authorizes service by mail upon a person who has, since the happening of an accident or collision occurring within the state, involving the use of a motor vehicle, become a resident of a state other than Ohio.

"7. The Act of the General Assembly passed in 1933 (115 O. Laws 36) now General Code 6308 to 6308-5, as construed by the trial court to authorize judgment against the defendant, or the new defendant herein, without service of summons as against the original defendant, Clarence Ferkel, are in contravention of Article I, Section XVI of the Constitution of Ohio and in contravention of Section I of the XIV Amendment of the Constitution of the United States."

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The Court of Appeals reversed the judgment of the lower court and held that the judgment against Clarence Ferkel was void for lack of service.

The plaintiffs appealed to the Supreme Court of Ohio which held:

> "Section 6308-2, General Code, providing in substance that process shall be served by the officer to whom directed or by the sheriff of Franklin county, upon being deputized, upon the Secretary of State of Ohio and by sending to the defendant by registered mail, postage prepaid, a like, true and attested copy thereof with an endorsement thereon and of the service upon said Secretary of State, addressed to such defendant at his last known address and that 'The registered mail return receipt of such defendant shall be attached to and made a part of the return of service of process' makes it reasonably certain that such notice will be received by the defendant and does not require acutal delivery of the notice to give the court jurisdiction in the cause, and is not constitutionally invalid." *Hendershot* v. *Ferkel*, 144 O. S. 112, 56 N. E. (2d) 205.

The Supreme Court remanded the case for further proceedings in the Court of Appeals on the question of the failure of the assured to comply with the policy requirements as to notice. The appellant again filed among others assignments of error 6 and 7 set out above. Again the Court of Appeals found in favor of the Motorists Mutual Insurance Company.

The plaintiff appealed to the Supreme Court of Ohio. Pursuant to § 12233-21 (a) General Code of Ohio and Amended Rules II Section 2 (b) of the Supreme Court of Ohio, Motorists Mutual Insurance Company filed its assignments of error in the Supreme Court which were as follows:

> "1. The act of the General Assembly passed in 1933 (115 O. Laws, 36) found in General Code Section 6308-1 to Section 6308-5, is in contravention of Article

I, Section 16 of the Constitution of Ohio, and in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in so far as said act authorizes service by mail upon a person who has, since the happening of an accident or collision occurring within the state, involving the use of a motor vehicle, become a resident of a state other than Ohio.

"2. The act of the General Assembly passed in 1933 (115 O. Laws, 36) now General Code Section 6308-1 to Section 6308-5 as construed by the trial court to authorize judgment against the defendant, or the new defendant herein, without service of summons as against the original defendant Clarence Ferkel, is in contravention of Article I, Section 16 of the Constitution of Ohio and in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

"3. A construction of Sections 9510-1 to and including 9510-4, General Code, which denies to the new defendant a right of defense arising from violation of policy conditions respecting the failure to give notice of claim and transmit to the new defendant all summons and process in suits commenced against the assured is in contravention of Article I, Section 16, and Article II, Section 28, of the Constitution of Ohio and of Article I, Section 10, of the Constitution of the United States and Section 1 of the Fourteenth Amendment to the Constitution of the United States."

The Supreme Court again reversed the Court of Appeals and entered final judgment in favor of the plaintiff. The Supreme Court took no further action on the questions involving the non-resident service statute, General Code § 6308-1–6308-5 inclusive. The opinion of the Supreme Court is found in *Hendershot* v. *Ferkel*, 147 O. S. 111, — N. E. (2d) —.

WILBUR E. BENOY,
ARTHUR M. SEBASTIAN,
Counsel for Appellant.

Of Counsel:
BENOY, SAXBY & SEBASTIAN.

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APPENDIX "A"

IN THE SUPREME COURT OF OHIO

HENDERSHOT, *Appellant*,

v.

FERKEL: MOTORISTS MUTUAL INS. CO., *Appellee*

Judgments—Casualty insurance—Supplemental petition by judgment creditor against insurer to satisfy judgment—Section 9510-4, General Code—Insurer may defend upon ground judgment void—Invalidity of judgment to appear from record of court rendering judgment—Service of summons upon nonresident through Secretary of State—Section 6308-2, General Code—Service by registered mail to defendant's last known address—Actual delivery of notice not required to give court jurisdiction—Constitutional law.

1. In an action brought on a supplemental petition under Section 9510-4, General Code, by a judgment creditor against an insurance company, seeking to have the insurance money, provided for in the contract of insurance between the insurance company and the defendant, applied to the satisfaction of the judgment must appear from the record of the court in the case wherein the judgment was rendered and evidence contradicting such record is incompetent.

2. Section 6308-2, General Code, providing in substance that process shall be served by the officer to whom directed or by the sheriff of Franklin County, upon being deputized, upon the Secretary of State of Ohio and by sending to the defendant by registered mail, postage prepaid, a like, true and attested copy thereof with an endorsement thereon of the service upon said Secretary of State, addressed to such defendant at his last known address and that "The registered mail return receipt of such defendant shall be attached to and made a part of the return of service of process" makes it reasonably certain that such notice will be received by the defendant and does not require actual delivery of the notice to give the court jurisdiction in the cause, and is not constitutionally invalid.

(No. 29705—Decided August 9, 1944)

Appeal from the Court of Appeals of Sandusky County

Anna L. Hendershot, on September 1, 1937, instituted an action in the Court of Common Pleas of Sandusky county, Ohio, wherein she sought to recover damages for injuries she claimed to have sustained as a result of the negligence of Clarence Ferkel in the operation of an automobile owned by his father who was the assured of the defendant in the present proceeding, Motorists Mutual Insurance Company.

Ferkel resided with his parents near Clyde, Ohio, until February, 1937, when he departed for California where he has since resided. Service of summons was made, or attempted, by leaving a copy at his father's residence. By reason of diversity of citizenship, that case was removed to the federal court at Toledo where, upon motion, the service of summons was quashed and later that case was dismissed for want of prosecution.

Thereafter, on September 24, 1938, the present action against Ferkel was filed in Sandusky county. Pursuant to the praecipe, summons was issued under Section 6308-2, General Code, with directions for service at 2024 Sherbourne Drive, Los Angeles, California, which was the address given by the defendant Clarence Ferkel in his affidavit of September 27, 1937, which had been filed upon the hearing of the motion to quash service in the former case in the federal court. Service was made on the Secretary of State with proper return, and an attested copy thereof was sent by registered mail to Clarence Ferkel with address 2024 Sherbourne Drive, Los Angeles, California. The envelope containing the copy was returned by the postal department to the sheriff of Sandusky county endorsed, "Unknown at address," and the sheriff's return was so made.

The case proceeded to trial, and judgment was entered against Ferkel in the sum of $2,750.

A supplemental petition was filed January 30, 1941, pursuant to the provisions of Section 9510-4, General Code, wherein the Motorists Mutual Insurance Company was made a defendant. Issue of the validity of the service upon Clarence Ferkel and of the judgment against him was made

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by answer and reply. The finding of the Common Pleas Court was in favor of the plaintiff, and judgment was thereupon rendered against the Motorists Mutual Insurance Company in the sum of $2,750.

Upon appeal to the Court of Appeals, that court reversed the judgment of the Court of Common Pleas and rendered final judgment for the Motorists Mutual Insurance Company upon the ground, as stated in the journal entry, that "no service of summons was had upon the defendant, Clarence Ferkel, by reason whereof the purported judgment rendered by the Common Pleas Court against defendant Clarence Ferkel is void, and by reason thereof the plaintiff-appellee did not have a cause of action against defendant-appellant on her supplemental petition."

Upon motion, the record was ordered certified to this court.

Mr. James M. Hinton and *Mr. Glenn P. Bracy,* for appellant.

Mr. Wilbur E. Benoy, Mr. Arthur M. Sebastian and *Messrs. Stahl, Stahl & Stahl,* for appellee.

MATTHIAS, J.:

The question presented, the answer to which is determinative of this case, is whether the judgment against the defendant Ferkel upon which the supplemental petition against the defendant Motorists Mutual Insurance Company is predicated was void. The answer of the Court of Appeals was in the affirmative.

If that judgment is valid it has become final. In any event, the right of the defendant Motorists Mutual Insurance Company or Clarence Ferkel to offer additional evidence dehors the record as to the validity of that judgment is terminated. In the absence of fraud the validity thereof must be decided upon the record of the case in which the judgment was rendered.

The complete file of the original damage suit was offered in evidence in this supplemental proceeding and is before this court. This consists chiefly of the pleadings filed therein, the return of service of the sheriff of Sandusky county, Ohio, and the judgment entry of the Court of Common Pleas.

Section 9510-4, General Code, authorizes a proceeding against an insurance company by supplemental petition as therein provided only upon the recovery of a final judgment against a defendant insured by such company against loss or damage if the judgment is not satisfied within thirty days after the date when it is rendered. To warrant the rendition of a valid judgment it is conceded that it is essential that service must have been made in strict accordance with the requirements of statute in that regard.

Service upon the defendant Ferkel was attempted to be made pursuant to and in accordance with the provisions of Section 6308-2, General Code. That section provides in substance that process shall be served by the officer to whom directed or by the sheriff of Franklin County, upon being deputized, upon the Secretary of State "and by sending to the defendant, by registered mail, postage prepaid, a like true and attested copy thereof, with an endorsement thereon of the service upon said Secretary of State, addressed to such defendant at his last known address. The registered mail return receipt of such defendant shall be attached to and made a part of the return of service of process."

The return of the sheriff of Sandusky county reads as follows:

"Received this writ September 24, 1938, at two o'clock p. m., and on October 3, 1938, I served the within named Clarence Ferkel by sending to him at his last known address, by registered mail, postage prepaid, a true and attested copy thereof, with an endorsement thereon of the service upon the Secretary of State of the State of Ohio, as his agent for the service of process, which registered mail was returned by the postal department, endorsed 'unknown at address'."

The return of the sheriff of Franklin county is omitted, there having been no challenge of its validity.

The following journal entry shows the action of the Court of Common Pleas upon the trial of the case:

"This cause came on to be heard upon the petition of the plaintiff, the return of service of summons by the sheriff of Sandusky county, and the evidence, and

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"Upon consideration thereof, the court finds that the defendant, Clarence Ferkel, has been duly and regularly served with summons in this action according to law as provided by G. C. 6308-2 et seq., and that no request for a continuance has been made by the defendant or by anyone on his behalf, and that the defendant is in default for answer or other pleading to the petition of the plaintiff and by such default accordingly confesses the allegations of plaintiff's petition to be true.

"The court further finds from the evidence that the defendant was guilty of negligence in the operation of the automobile which he was driving at the time and place set forth in plaintiff's petition and that as a direct and proximate result of such negligence of the defendant that the plaintiff was damaged by suffering personal injuries in the sum of twenty-seven hundred fifty dollars ($2,750).

"Wherefore, it is considered that the plaintiff, Anna L. Hendershot, recover from the defendant, Clarence Ferkel, the sum of twenty-seven hundred fifty dollars ($2,750) and the costs of this action.

"A. V. BAUMANN,
Judge."

Since the defendant insurance company can prevail only if the judgment on its face is void, the only question now presented is whether the record of the original proceeding herein shows a failure to secure service upon the defendant, Clarence Ferkel. This necessarily involved an interpretation of the language of Section 6308-2, General Code, as above set forth.

The return of the sheriff shows that he "served the within named Clarence Ferkel by sending to him *at his last known address* * * * a true and attested copy thereof." (Italics ours.)

The entry of the Court of Common Pleas shows that the court found "that the defendant, Clarence Ferkel, has been duly and regularly served with summons in this action according to law as provided by G. C. 6308-2 et seq. * * *."

Whether the summons was sent to the place which was "the last known address" of the defendant is a question of fact, presumably determined by the court upon competent

evidence. It is claimed in argument that the trial court heard such evidence, although the testimony is not brought into the record, and is not before the court. See 5 American Jurisprudence, 831, Section 591; 82 A. L. R., 772; 96 A. L. R., 597; 125 A. L. R., 469—citing *State, ex rel. Nelson* v. *Grimm*, 219 Wis., 630, 263 N. W., 583, 102 A. L. R., 220.

Conceding that the insurance company's claim that the plaintiff must use diligence to ascertain the "last known address" of the defendant, nevertheless that was a question for the determination of the Court of Common Pleas in the orginal damage action and presumably was there determined. Judgment rendered upon such finding has become final and cannot be attacked or impeached in this proceeding. Testimony offered for such purpose was incompetent.

The most important question here is the effect of a want of delivery to the defendant personally of the registered letter containing the copy of the summons and absence of a signed receipt therefor. It is now well established by the case of *Wuchter* v. *Pizzutti*, 276 U. S., 13, 72 L. Ed., 446, 48 S. Ct., 259, 37 A. L. R., 1230, in the case of *Hess* v. *Pawloski*, 274 U. S., 352, 71 L. Ed., 1091, 47 S. Ct., 632, decided by the Supreme Court of the United States, that actual notice to a nonresident defendant in such a case is not essential to due process. In the opinion in the *Wuchter case*, Chief Justice Taft, after citing numerous cases, made the following pertinent statement:

"These cases and others indicate a general trend of authority toward sustaining the validity of service of process, if the statutory provisions in themselves indicate that there is reasonable probability that if the statutes are complied with, the defendant will receive actual notice, and that is the principle that we think should apply here."

This view is reiterated in the case of *Henry L. Doherty & Co.* v. *Goodman*, 294 U. S., 623, at page 628, 79 L. Ed., 1097, 55 S. Ct., 553, in the following language of the opinion:

"The power of the states to impose terms upon nonresidents, as to activities within their borders, recently has been much discussed. *Hess* v. *Pawloski*, 274 U. S., 352; *Wuchter* v. *Pizzutti*, 276 U. S., 13; *Young* v. *Masci*, 289 U. S.,

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253. Under these opinions it is established doctrine that a state may rightly direct that nonresidents who operate automobiles on her highways shall be deemed to have appointed the Secretary of State as agent to accept service of process, provided there is some 'provision making it reasonably probable that notice of the service on the secretary will be communicated to the nonresident defendant who is sued.' "

The question here is whether under the provisions of Section 6308-2, General Code, actual notice to the defendant is required. The provision for mailing the copy of summons "to the last known address" in itself evidences a legislative intent to provide for cases in which notice is not actually delivered to the defendant. Were it intended in every case that notice be actually delivered to a defendant, there would be no necessity for providing that notice should be sent to a particular place, to wit, the "last known address."

The statutes of Ohio do not generally require that a defendant receive the summons in order that service be complete. Section 11286, General Code, which is the section providing the method of service in civil actions in this state, provides as follows:

"The service shall be made at any time before the return day, by delivering a copy of the summons, with the indorsements thereon, to the defendant personally, or by leaving a copy at his usual place of residence; or, if the defendant is a partnership sued by its company name, by leaving a copy at its usual place of doing business, or with any member of such partnership. The return must be made at the time mentioned in the writ, and the time and manner of service shall be stated on the writ."

It is to be observed that actual delivery of the summons to the defendant is not essential to accomplish valid service. Valid service may be effected by "leaving a copy at his usual place of residence."

This statute has been effective since the enactment of the Code of Civil Procedure on July 1, 1853 (51 Ohio Laws, 67, Section 62, 63 and 64).

In Section 11297-1, General Code, the General Assembly authorizes service of process by registered mail. But in this section specific and definite directions are given in regard to such mailing. In this section we find the following pertinent language:

"When provisions for service by mail, registered or otherwise, is (are) so made, a return of the sheriff or other officer or person charged by law with the duty of serving said writ or process, that a true copy of the writ or process was deposited in the mail registered, or otherwise shall be proof of residence service at the address on the envelope containing such writ of process; provided that such residence be the correct residence address of the party to be served and that such envelope be not returned by the postal authorities as undelivered."

Section 6308-2, General Code, was enacted several years subsequent to the enactment of Section 11297-1, General Code. The failure of the General Assembly to use language of similar import in the subsequently enacted provision shows that it did not intend to require proof of actual delivery of the summons to the defendant in a suit such as this.

It is well settled that such statutory provisions, being in derogation of the common law, must be strictly followed in order to invest the court with jurisdiction. But likewise it is axiomatic that all parts of a statute are to be construed together. Section 6308-2, General Code, makes it reasonably certain that notice will reach the defendant, but does not require proof that the defendant received such notice as a prerequisite to jurisdiction to hear and determine the cause.

Defendant claims further that Section 6308-2 et seq., General Code are inapplicable to one who was a resident of the state when the injury occurred and thereafter became a resident of another state and, if deemed applicable, the provisions are unconstitutional. Such persons are expressly included within the provisions of Section 6308-5, General Code. It is as follows:

"This act shall be construed to extend the right of service of process upon nonresidents and upon residents

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who subsequently became nonresidents or who conceal their whereabouts and shall not be construed as limiting any provisions for the service of process now or hereafter existing."

Undoubtedly the state has the same constitutional authority to govern and control actions against its citizens arising from the operation of motor vehicles as it has where the action is against nonresidents operating motor vehicles within the state.

The defendant finally contends that Clarence Ferkel violated the provisions of the contract of insurance in failing to give it notice of this suit, although at the same time contending that he had no notice of the suit to forward to it, in compliance with the terms of the policy. This question is not before this court. It was submitted to the trial court, and it found adversely to the defendant. The Court of Appeals considered no issue except that of service.

The judgment of the Court of Appeals is therefore reversed and the cause is remanded to that court for further proceedings.

Judgment reversed and cause remanded

Weygandt, C. J., Zimmerman, Bell, Williams and Turner, JJ., concur:

Hart, J., dissenting. Service of the character here attempted must strictly follow the statute in order to satisfy due process.

The statute requires not only service upon the Secretary of State, but a registered letter with like notice mailed to the defendant at his last known address, and as proof that he received it, the registered mail return receipt of such defendant shall be attached and made a part of the return of service of such process." Section 6308-2, General Code.

This latter requirement was not complied with. On the contrary, the return of the sheriff shows that the defendant not only did not receive the registered mail notice, but that he would not, in all probability, receive any such notice through any other source. In my opinion, because

of lack of service under the statute, the judgment was not voidable but void, and subject to attack at any time by anyone affected thereby.

APPENDIX "B"

IN THE SUPREME COURT OF OHIO

Hendershot, Appellant, v. Ferkel: Motorists Mutual Ins. Co., Appellee

Judgments—Liability insurance—Supplemental petition by judgment creditor against insurer—Section 9510-4, General Code—Defense that insurer not given reasonable notice plaintiff's action pending—Appeal—Error to reverse judgment against insurer, when—Reasonableness of notice question of fact for trial court, when.

Where in a trial without a jury in the Court of Common Pleas upon the issues made on a supplemental petition filed by a judgment creditor pursuant to Section 9510-4, General Code, the sole defense was that the plaintiff did not give the insurance company reasonable notice of the pendency of plaintiff's action prior to the judgment for damages and it was admitted that the notice was actually given but the evidential facts adduced were such that reasonable minds might reach different conclusions as to its reasonableness, the Court of Appeals on appeal from a judgment entered by the trial court against the insurance company committed prejudicial error in reversing such judgment and rendering final judgment in favor of that company. (No. 30590—Decided July 24, 1946.)

Appeal from the Court of Appeals for Sandusky County

Statement of the Case

This action was brought by the plaintiff, Anna L. Hendershot, on September 24, 1938, in the Court of Common Pleas of Sandusky county, against Clarence Ferkel to recover damages for injuries claimed to have been sustained by her

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as a result of the negligence of the defendant Ferkel in the operation of his father's automobile. Service of summons was made under Section 6308-2, General Code, upon the Secretary of State and a true and attested copy of the writ was sent by registered mail to the defendant Ferkel at his last known address in the state of California. Such registered mail was returned by the postal department, endorsed "unknown at address" and the sheriff's return so shows.

The attorneys for plaintiff, by registered letter dated January 20, 1940, notified the Motorists Mutual Insurance Company, which had issued an insurance policy covering such automobile, that the case had been set for trial on January 29, 1940, and that judgment would be taken at that time. The insurance company having received such letter on January 22, 1940, replied that it had not received a copy of the petition, summons or other process and would stand upon its rights under the insurance policy.

On the date set, the defendant Ferkel being in default for answer or other pleading and failing to appear, the trial court found that he was guilty of negligence in the operation of his father's automobile, and that as a proximate result of such negligence the plaintiff, Anna L. Hendershot, suffered personal injuries and was damaged thereby to the extent of $2,750, in which amount judgment was rendered in her favor.

Thereafter, on January 30, 1941, a supplemental petition was filed pursuant to Section 9510-4, General Code, and the Motorists Mutual Insurance Company was made a party defendant. A jury was waived and the cause tried to the court. Upon consideration of the evidence adduced, the court rendered judgment in favor of the plaintiff, Anna L. Hendershot, against the defendant insurance company in the same amount awarded against defendant Ferkel.

On appeal the Court of Appeals reversed the judgment against the insurance company and entered final judgment in its favor, upon the ground that the judgment against the defendant Ferkel was void for want of lawful service and, therefore, plaintiff was not entitled to recover on the supplemental petition.

This court reversed the judgment of the Court of Appeals and remanded the cause to that court for further proceedings. *Hendershot* v. *Ferkel*, 144 Ohio St., 112, 56 N. E. (2d), 205.

Thereupon the plaintiff, Anna L. Hendershot, having died, the cause was revived in the name of Harry Hendershot, as administrator of her estate.

The appellate court, upon further hearing, again reversed the judgment of the Court of Common Pleas and, entering the judgment which it, the appellate court, deemed the court below should have entered, dismissed the supplemental petition.

This court allowed a motion to certify the record.

Mr. James M. Hinton and *Mr. Glenn P. Bracy*, for appellant.

Messrs. Stahl, Stahl & Stahl and *Messrs. Benoy, Saxby & Sebastian*, for appellee.

WILLIAMS, J.: The ground of such second reversal is, in short, that the defendant Ferkel, having no knowledge of the pendency of the present action, could not give notice thereof to the defendant insurance company; that the plaintiff, Anna L. Hendershot, was bound to give such notice; and that the notice given by her was not reasonable.

The sole question before this court now is whether that ground of error is well founded.

The insurance policy involved, which was taken out in the name of the father, William Ferkel, on his automobile, contained the following provision:

"In the event of an accident involving injuries or death to persons, or property damage, covered by this policy, the assured shall give immediate notice thereof, with the fullest information possible, to the home office of the company as soon after such occurrence as may be reasonably possible: he shall notify the company at its home office immediately of any claim, whether groundless or otherwise, which may be asserted against him by reason of the ownership, maintenance or use of the automobile herein de-

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scribed; and in the event suit may be brought against the assured to enforce such claim the assured shall forthwith forward to the company at its home office every summons, subpoena or other paper served upon him; and the assured will, without charge, assist the company in the investigation, settlement or defense of any such claim or suit until the same shall have been finally disposed of."

The policy contained also an omnibus clause which protected the defendant Ferkel in driving the insured's automobile.

Neither the defendant Ferkel nor his father ever violated the provisions of this policy by failing to give notice or otherwise. This statement is borne out by an analysis of the facts.

The defendant insurance company had gained knowledge of the claim of the plaintiff, Anna L. Hendershot, in the year 1937 through a previous action brought in Sandusky County, Ohio, to recover damages for the same injuries. Service of summons therein was made by leaving a copy at the residence of defendant's father, William Ferkel, in that county, and he promptly sent the summons to the defendant insurance company. Prior to the time of that service, the defendant Ferkel had gone to the state of California and taken up his residence there.

The defendant insurance company defended that action and through its counsel caused the case to be removed to the United States District Court where the service of summons was quashed on motion of the defendant Ferkel, filed by the attorneys of such insurance company. Thereafter and before the commencement of the present action, that is, the second action for damages, such previous suit was dismissed for want of prosecution. See *Hendershot* v. *Ferkel, supra.*

It is therefore plain that the defendant insurance company had ample time to make investigation and gather all available information that would be valuable in making a defense.

The father promptly forwarded the summons in the first action for damages and otherwise cooperated with

the insurer at all times. The son could not forward the summons in the second action for damages or otherwise co-operate because no papers were served on him personally and he had no knowledge of that action until after the judgment was rendered against him. On the other hand neither the contract of insurance nor any statute imposed on the injured plaintiff an obligation to give to the insurer notice of the pendency of such an action.

The Court of Appeals, however, held that it was such plaintiff's duty to give reasonable notice and stated its position in the following language:

"The plaintiff and her counsel knew, in October, 1938, from the return of the summons with the notation on the envelope 'unknown at address', and the lack of a signed register receipt that Clarence Ferkel had not in fact received the summons. (Exhibit referred to) They also knew from the appearance of counsel for the insurance company in the first action and the resultant removal of the case to the District Court, October 9, 1937, that the defendant was protected by insurance and that the insurance company was interested in the case and undertaking its defense, and she could and should have protected her rights as against the insurance company by notifying it of the institution of the instant action. Not having done so, she cannot, under the law as enunciated by our Supreme Court, have recourse to the new defendant, Motorists Mutual Insurance Company. Under the circumstances disclosed by the record, the defendant Ferkel being in California, the letter of January 20, 1940, cannot be held to be a reasonable notice of the pendency of the action."

The pronouncements of this court relied on as enunciating the rule that plaintiff must give notice to the insurance company are *Stacey* v. *Fidelity & Casualty Co. of New York,* 114 Ohio St. 633, 151 N. E. 718; *Hartford Accident & Indemnity Co.* v. *Randall,* 125 Ohio St. 581, 183 N. E. 433; *Luntz et al., Exrs.,* v. *Stern,* 135 Ohio St. 225, 20 N. E. (2d) 241; and *In re Estate of Basmajian,* 142 Ohio St. 483, 52 N. E. (2d) 985. These cases do hold that

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the judgment creditor stands in the shoes of the insured judgment debtor and that, if the latter cannot recover against the insurance company, the former cannot. But here the defendant Ferkel, if compelled to pay the judgment, could recover against the insurance company for the reason that neither he nor the named insured violated the contract of insurance in any way. The cases relied on, moreover, do not settle the question whether, under such circumstances as we have here, the injured party must give notice of a pending damage case to the insurance company as a prerequisite to a right to recover over against such company upon the issue made on a supplemental petition.

It is not necessary, however, to determine whether a legal duty rested on the plaintiff to give the insurer notice of the pendency of the action for damages, provided it is determined that the reasonableness of the notice was under the evidence a question of fact for the trial court.

The defendant insurance company had no notice of the second trial until the receipt of the registered letter from plaintiff's counsel on January 22, 1940—seven days before the day the trial was set and the judgment taken against the defendant Ferkel; but in view of the fact that the insurer had then known of plaintiff's claim for damages for more than two years and nevertheless elected not to defend the second action, it cannot be said as a matter of law that the notice was not reasonable, unless by the lateness of its receipt some right was lost.

Now it is urged that "the right of removal to the federal court has been lost by expiration of the time element"; and authorities are cited to the effect that a petition and bond for removal must be filed within the time given to plead or answer and unless so filed, removal may be had only with plaintiff's consent. True, when notice was received, the last day to plead or answer had gone by; but it is doubtful whether that rule applies under the facts presented here for a petition for removal could not be filed until the insurer learned of the pendency of the case; at any rate that question would be for the determination of the court to which removal was made. 2 Cyclopedia

of Federal Procedure, 341 Section 419 (note 22) and 431, Section 470. It is enough to say that removal was not even attempted. Certainly the defendant Ferkel was entitled to have defense made as required by the policy and it hardly lies in the mouth of the insurance company to say that in failing to do its duty to such defendant it established rights against the plaintiff. Had prompt defense been made resulting in a determination that the right of removal had been lost, by delay in giving notice, that fact could then well be urged to have a cogent bearing on the question of reasonableness as a matter of law.

Assuming but not deciding that notice was required, we conclude that in view of all the surrounding circumstances the question of reasonableness was one of fact for the trial court, a jury having been waived, and that the finding and judgment therein against the insurance company must be sustained.

Therefore the Court of Appeals committed prejudicial error in reversing the judgment of the court below and entering final judgment for the insurance company as a matter of law. Accordingly, the judgment of the Court of Appeals is reversed and that of the Court of Common Pleas affirmed.

Judgment reversed.

Weygandt, C. J., Zimmerman, Bell, Turner and Matthias, JJ., concur.

Hart, J., dissents.

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Supreme Court of the United States

No. .....

MOTORISTS MUTUAL INSURANCE COMPANY OF COLUMBUS, A CORPORATION,

Appellant,

vs.

HARRY HENDERSHOT, ADMINISTRATOR OF THE ESTATE OF ANNA L. HENDERSHOT, DECEASED,

Appellee.

BRIEF OF APPELLANT CONTRA MOTION TO DISMISS APPEAL OR AFFIRM DECISION OF SUPREME COURT OF OHIO.

Statements contained in **"Appellee's Statement of Grounds Making Against the Jurisdiction of this Court"** are contrary to the facts established in the record and his statement of the main point of jurisdiction relied on is not correctly stated.

Prior decisions of this court referred to in the jurisdictional statement require a reversal of the final judgment of the Supreme Court of Ohio and directions to enter final judgment in behalf of appellant.

Appellant has been denied protection of the Fourteenth Amendment.

Clarence Ferkel did not conceal his whereabouts. The accident from which Anna L. Hendershot claimed to have received injuries, occurred October 10, 1936. Clarence Ferkel, at all times stated in the record, was unmarried and left for California February 10, 1937, where he established his residence and citizenship. At the time of the attempted service of the registered letter in September of 1938, he was a resident of Los Angeles, California, residing at 1212 S. Bonnie Brae, where he lived until November of 1939, when he was inducted into the military service. The precipe directs the clerk to issue summons to the sheriff of Sandusky county, Ohio, for defendant, Clarence Ferkel, 2024 Sherbourne dr., Los Angeles, Calif., to be served in accordance with Section 6308-2 of the General Code of Ohio. The sheriff followed the directions in the precipe and on October 7, 1938, the registered mail which he had addressed to Clarence Ferkel at 2024 Sherbourne drive, Los Angeles, California, was returned to the sheriff by the postal department unopened and marked, as reason for nondelivery, "Unknown at Address."

The sheriff made return showing that he had mailed the envelope by registered mail, postage prepaid, which registered letter was returned by the postal department endorsed "Unknown at Address." No registered mail return receipt was attached to the return. None existed.

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The record establishes that defendant Ferkel had no knowledge of the attempt to get service upon him or of the alleged pendency of the case until after he read a newspaper account which had been sent to him by his mother from his former residence in Ohio, that a judgment had been rendered against him.

Ferkel was never served with process. The judgment was, therefore, void.

The foregoing facts taken from the record demonstrate the untruth of the statement found in appellee's brief stating that the sheriff of Sandusky county made due return of his service "and attached a copy of the registered mail return receipt to his return."

No registered mail return receipt was returned with the undelivered envelope and none was ever in existence; and that fact has heretofore been freely conceded and was fully proven by the record. Contained in the original record offered in evidence was the unopened, registered letter.

Plaintiff could not proceed against the appellant under Section 9510-4, General Code of Ohio, until it had recovered a valid, final judgment against the insured Ferkel.

The Supreme Court of Ohio (144 O. S., 112), on the first appeal, in the syllabus held that the appellant "may, as a defense, show that the judgment which is the foundation of the creditors' action, is void" but held that the judgment was not void; held that Section 6308-2 "does not require actual delivery of the notice to give the court jurisdiction in the cause, and is not constitutionally invalid."

Appellant knew nothing of the alleged pendency of the action until the morning of the seventh day preceding the trial of the case, with its insured in California, his whereabouts then unknown to it, and without any opportunity whatsoever to make preparation for trial, or to have Ferkel present.

Plaintiff's counsel seven days before the trial commenced, served upon appellant notice of the alleged pendency of the case; notice that it had been assigned for trial on the following Monday morning, and that judgment would be taken thereon at said time. Counsel for plaintiff were promptly informed that appellant had no prior notice of the alleged pendency of the litigation; that there was no opportunity to prepare for the trial of the case; it had received no copy of the petition; it had received no summons or other process and that the company was obliged to stand upon the rights reserved to it in its policy of insurance. Nevertheless, plaintiff proceeded to take default judgment with no service of process upon defendant Ferkel.

A SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

Counsel say that the constitutionality of nonresident service statutes have been established by the prior decisions of this court which cases are cited in our jurisdictional statement. That is not a correct statement of the main federal question presented. As shown by the jurisdictional statement, the main substantial federal constitutional question presented is whether the statute **as construed by the Supreme Court of Ohio**, in its decisions (and particularly in the first appeal reported, 144 O. S., 112), denies to the defendant due process of law under the Fourteenth Amendment.

In **Wuchter v. Pizutti**, 276 U. S., 13, no provision was made in the statute under consideration for communicating notice to the nonresident motorist. Chief Justice Taft there said:

> "The question made in the present case is whether a statute, making the secretary of state the person to receive the process, must, in order to be valid, contain a provision making it reasonably probable that notice of the service on the secretary will be communicated to the nonresident defendant who is sued. Section 232 of the Laws of 1924 **makes no such requirement** and we have not been shown any provision in any applicable law of the state of New Jersey requiring such communication. **We think that a law with the effect of this one should make a reasonable provision for such probable communication.** We quite agree, and, indeed, have so held in the Pawloski case, that the act of a nonresident in using the highways of another state may be properly declared to be an agreement to accept service of sum-

mons in a suit growing out of the use of the highway by the owner of the automobile, but the enforced acceptance of the service of process on a state officer by the defendant would not be fair or due process unless such officer or the plaintiff is required to mail the notice to the defendant, or to advise him, by some written communication, so as to make it reasonably probable that he will receive actual notice. Otherwise, where the service of summons is limited to a service of the secretary of state or some officer of the state, without more, it will be entirely possible for a person injured to sue any nonresident he chooses, and through service upon the state official obtain a default judgment against a nonresident who has never been in the state, who had nothing to do with the accident, or whose automobile having been in the state never injured anybody. **A provision of law for service that leaves open such a clear opportunity for the commission of fraud** (Heinemann v. Pier, 110 Wis., 185, 85 N. W., 646), **or injustice is not a reasonable provision**, and in the case supposed would certainly be depriving a defendant of his property without due process of law. The Massachusetts statute considered in **Hess v. Pawloski really made necessary actual personal service to be evidenced by the written admission of the defendant.** In **Kane v. New Jersey**, the service provided for by statute was by mail to the **necessarily known registered address** of the licensed defendant.

* * *

Every statute of this kind, therefore, should require the plaintiff bringing the suit to show in the summons to be served the postoffice address or residence of the defendant being sued, and should impose either on the plaintiff himself or upon the official receiving service or some other, the duty of communication by mail or otherwise with the defendant." (Emphasis ours.)

This court after reviewing numerous authorities again say in the above case, that:

> "These cases and others indicate a general trend of authority toward sustaining the validity of service of process, if the statutory provisions **in themselves** indicate that there is reasonable probability that **if the statutes are complied with**, the defendant will receive **actual notice**, and that is the principle that we think should apply here.
>
> But it is said that the defendant here had actual notice by service out of New Jersey in Pennsylvania. He did not, however, appear in the cause and such notice was not required by the statute. Not having been directed by the statute it can not, therefore, supply constitutional validity to the statute or to service under it." (Emphasis ours.)

Applying the foregoing previous observations of this court, it will be noticed that the statutory provisions in this case, while observed by the sheriff in making his return, were ignored by the trial court and by the majority of the Supreme Court; that they were adhered to by the Court of Appeals and in the dissenting opinion of the Supreme Court.

Further applying the second paragraph of the foregoing quotation, the voluntary notice to the appellant was extraneous to the statutory provisions for service on Ferkel, leaving the judgment without constitutional support.

Also see **Washington, ex rel. Bond & Goodwin & Tucker, v. Superior Court**, 289 U. S., 361, 366; 77 L. Ed., 1256, 1260; 89 A. L. R., 653, 657.

Counsel cite **Kane v. New Jersey**, 242 U. S., 160. The emphasized words from the above quotation from Chief Justice Taft concerning the Kane case, indicates the

necessary distinction of that case from the facts in this, viz.: "the necessarily known registered address."

In adopting the Ohio nonresident service statute, the general assembly of the state not only required service upon the secretary of state as the agent of the non-resident motorist; but further, in order to safeguard the requirements laid down by this court in its previous decisions, incorporated the further provision that, subsequent to the making of service upon the secretary of state, the sheriff should communicate the fact of the pendency of the suit, together with the return of service upon the secretary of state, "by sending to the defendant, by registered mail, postage prepaid, a like true and attested copy thereof (the summons), with an endorsement thereon of the service upon said secretary of state, addressed to such defendant at his last known address. **The registered mail return receipt of such defendant shall be attached to and made a part of the return of service of such process.**" (Emphasis ours.) (Section 6308-2, General Code of Ohio, 115 O. L., 36.)

The Supreme Court of Ohio by construction, read the emphasized provision of the statute out of it thereby making it, as amply illustrated in this case, uncertain that the defendant will receive, in such cases, notice of the pendency of the suit. As illustrated by this case, the defendant had no notice whatsoever of the alleged pendency of the action and of the impending judgment. Further, had the jury returned a verdict in excess of $5,000, Ferkel would have had no insurance coverage available to him, his policy limits being only $5,000.

We submit that the construction imposed by the Supreme Court of Ohio on the statute in question takes from it the constitutional certainty required by the decisions of this court and, as so construed, is clearly unconstitutional. Certainly such question is a substantial question. No plaintiff heretofore has been so bold as to attempt to secure a judgment under similar circumstances and still maintain that the judgment is valid.

In **Logan v. Liberty Mutual Insurance Co.** (1940), 305 Mass., 186, 25 N. E. (2d), 188, the Supreme Court of Massachusetts, under similar facts, holds that the judgment is void and no recovery may be had from the insurance company. It was there stated:

> "A valid judgment was a prerequisite of the suit; and there was none."

See also **Wis. v. Herzog**, 114 Fed. (2d), 486 (1940), a decision by the U. S. Court of Appeals for the District of Columbia.

Counsel assert and the Supreme Court of Ohio held, that "it is not necessary that the defendant receive actual notice." In this case there is no question presented with reference to the nonresident motorist refusing to receive the registered mail, or as to service upon an agent of the nonresident motorist or upon anyone authorized to receive notice for him. The judgment applied to the facts of this case is without foundation or constitutional support. We submit that no person can be held to any judgment where he had no notice and opportunity to defend.

In this case the provisions of the policy of insurance required Ferkel to transmit to the company all notices

of claim and process received by him. That was not done in this case nor could it be done by the defendant. In this respect the subsequent decision of the Supreme Court in this case, reported in 147 O. S., 111, is also without constitutional support. We submit that it is not constitutionally possible to substitute for service of summons upon a nonresident motorist, notice to his insurance carrier that an action has been filed against the nonresident motorist; particularly where, as in this case, the notice was received just seven days before the trial started, with the company's insured unavailable and his present whereabouts then unknown.

The record itself, without going outside of it, shows the lack of service. The sheriff's return showing that the mail was undelivered and returned unopened, and that the defendant was unknown at that address, and no postal receipt, being attached, was conclusive. The statements of fact contained in the sheriff's return are controlling.

Settlemier v. Sullivan, 97 U. S., 444;
Galpin v. Page, 18 Wall. (U. S.), 350, 366.

The return of the sheriff, which is a part of the record, on its face evidences the lack of service (42 Am. Jur., p. 105), and the return is conclusive (42 Am. Jur., pp. 110, 111). Had the defendant examined the record, he had a right to rely upon the recitals of fact contained therein that he had not been served with summons and, consequently, was not required to answer the petition. That is the purpose which the service of summons and return thereof serves.

We have passed the age when the sheriff of the county where summons was required to be served knew substantially all of the residents of the county and where they lived, and we have arrived at the time where summons, as in this case, may be issued to distant points; and to approve the construction of a statute which requires less than personal notice to a defendant under such circumstances is, we submit, a violation of the Fourteenth Amendment.

This case presents substantial constitutional questions. The judgment was void.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 670

MOTORISTS MUTUAL INSURANCE COMPANY,
Appellant,

vs.

HARRY HENDERSHOT, ADMINISTRATOR OF THE ESTATE OF ANNA L. HENDERSHOT, DECEASED

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

JAMES M. HINTON,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 670

MOTORISTS MUTUAL INSURANCE COMPANY OF COLUMBUS, OHIO, A CORPORATION,

Appellant,

vs.

HARRY HENDERSHOT, ADMINISTRATOR OF THE ESTATE OF ANNA L. HENDERSHOT, DECEASED,

Appellee

STATEMENT OPPOSING JURISDICTION

Statement of Facts

The record does not present for decision any substantial Federal question because any question under Section 1 of the Fourteenth Amendment has been completely foreclosed by numerous previous decisions of this Court, holding valid, statutes of other states, which the Ohio statutes in question were patterned after, and also prescribing the requirements for validity which the Ohio statutes fully meet.

The following facts which have either been omitted by appellant or not clearly stated further show appellant has not been denied protection of the Fourteenth Amendment. Clarence Ferkel, appellant's assured, came within the pur-

view of Ohio General Code Section 6308-1 as a resident of the State of Ohio who became a nonresident by leaving the State of Ohio shortly after injuring appellee's decedent by his negligent operation of a motor vehicle on a highway of the State of Ohio and also by concealing his whereabouts.

In appellee's action against Ferkel in the Common Pleas Court of Sandusky County, the county of Ferkel's former residence, the Ohio Secretary of State was duly served with process as required by Ohio General Code Section 6308-2. Also as required by the same statute within fifteen days before the return of such process a copy of the summons with an endorsement thereon was sent to Ferkel by registered mail addressed to his "last known address," 2024 Sherbourne Drive, Los Angeles, California. This address was given by him by affidavit supplied for him by appellant in another action. The Sheriff of Sandusky County made due return of his service upon the Secretary of State and that he had mailed said summons by registered mail to Ferkel at his "last known address" and attached a copy of the registered mail return receipt to his return.

The trial court regularly assigned the case for trial. As soon as appellee received notice of the trial date, it gave written notice to appellant of this and also of the service. Appellant had issued a policy by which it agreed to defend Ferkel in any such action however groundless. Under Ohio law appellee could not sue or serve appellant in such action and not until final judgment had been obtained against appellant's assured.

Upon receipt of said notice from appellee, appellant examined the file and all records of the case and elected to do nothing, in spite of its policy of insurance agreeing to defend Ferkel. Appellant could have secured a continuance but it made no request for the same. Such continuance is

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provided for by Ohio General Code Section 6308-4, which appellant has omitted and which provides as follows:

> "*Court may order continuance.* The court in which the action is pending may order such continuance as may be necessary to afford the defendant reasonable opportunity to appear and defend the action."

Appellant could also have moved to quash service of summons without entering any appearance in the action, or could have pleaded to the action on its merits.

The action was tried by the Court upon the record and evidence presented, which evidence is not a part of the record in this case because appellant did not see fit to make it a part of the record in the subsequent suit against it, which is the case out of which this appeal arises. The trial court found as a fact and upon evidence that summons had been sent to Ferkel at his "last known address" and that the Ohio service statutes had been fully complied with by appellee. The Supreme Court of Ohio in its opinion thereafter held that "whether the summons was sent to the place which was 'the last known address' is a question of fact presumably determined by the Court upon competent evidence." *Hendershot* v. *Ferkel and the Motorists Mutual Insurance Company*, 144 O. S. 112 at 117.

The trial court rendered judgment against Ferkel and the appellee again gave written notice to the appellant of this. Appellant again did nothing; the judgment became final and appellee sued appellant on its policy as provided by Ohio General Code Section 9510-4.

In this action appellant took Ferkel's deposition at San Luis Obispo, California, and was apparently at all times fully advised of Ferkel's whereabouts although it had offered no information about this to appellee when appellee gave it the aforesaid notices and did not gainsay that his "last known address" was the one which they had fur-

nished by his affidavit. Ferkel disclosed in this deposition that he had left the address given in his affidavit without leaving any mail forwarding address, had moved about the states of the west without any regular place of residence, had kept his whereabouts concealed and had received mail which he cared to receive at places other than where he was living.

The trial court rendered judgment against appellant upon its policy of insurance and upon appeal the Ohio Supreme Court affirmed such judgment in case No. 29705 of said Court on August 19, 1944, and remanded the case to the Court of Appeals for further proceedings. In this case the constitutional questions raised by the appellant were fully disposed of. Subsequently, July 24, 1945, in case No. 30590, the Supreme Court of Ohio again affirmed the judgment of the Common Pleas Court. In its opinion under the latter judgment, the Ohio Supreme Court made no rulings upon the constitutional questions raised by appellant because it had fully determined those by its judgment of August 19, 1944, in the former action before it. In its opinion rendered August 9, 1944, *Hendershot* v. *Ferkel*, 144 O. S. 112 (Syl. 3), the Ohio Supreme Court decided:

> "2. Section 6308-2, General Code, providing in substance that process shall be served by the officer to whom directed or by the sheriff of Franklin county, upon being deputized, upon the Secretary of State of Ohio and by sending to the defendant by registered mail, postage prepaid, a like, true and attested copy thereof with an endorsement thereon of the service upon said Secretary of State, addressed to such defendant at his last known address and that 'The registered mail return receipt of such defendant shall be attached to and made a part of the return of service of process' makes it reasonably certain that such notice will be received by the defendant and does not require actual delivery of the notice to give the court

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jurisdiction in the cause, and is not constitutionally invalid."

No Federal Question Presented

The only Federal question suggested by appellant is whether the Ohio statutes contravene Section 1 of the Fourteenth Amendment of the Constitution of the United States. Any question of the validity of the Ohio statutes is completely foreclosed by numerous previous decisions of this Court and we have accordingly filed a motion to dismiss this appeal or to affirm the judgment of the Supreme Court of Ohio.

The Ohio courts found appellee fully complied with the Ohio statutes. This was a question of fact and construction and presents no Federal question there being evidence to support the state court findings. *Waters Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 29 S. Ct. 220, 53 L. Ed. 417; *Great Northern Railway Co.* v. *Donaldson*, 246 U. S. 121, 38 S. Ct. 230, 62 L. Ed. 616; *Anglo-Chilean Nitro Sales* v. *Alabama*, 288 U. S. 218, 53 S. Ct. 373, 77 L. Ed. 710; *King* v. *West Virginia*, 216 U. S. 92, 30 S. Ct. 225, 54 L. Ed. 396; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 62 S. Ct. 766, 86 L. Ed. 1031.

In *Kane* v. *New Jersey*, 242 U. S. 160, 37 S. Ct. 30, 61 L. Ed. 222, this Court affirmed a decision of the Court of Error and Appeals of New Jersey, holding that a New Jersey statute (almost identical with the Ohio statute) providing for notice to the defendant by letter directed to him at the post office address stated by him in an application for license did not violate Section 1 of the Fourteenth Amendment.

This case was decided December 4, 1916, and this Court there said:

"The power of a state to regulate the use of motor vehicles on its highways has been recently considered

by this Court and broadly sustained. It extends to nonresidents as well as to residents."

(61 L. Ed. at 227.)

In *Hess* v. *Pawloski*, 274 U. S. 352, 71 L. Ed. 1091, 47 S. Ct. 632, this Court upheld a Massachusetts statute (again almost identical with the Ohio statute) which provided for notice to the defendant by mailing the process to him by registered mail.

The requirement of the Ohio statute is even more rigid and specifies mailing to defendant's "last known address."

In *Wuchter* v. *Pizzutti*, 276 U. S. 13, 48 S. Ct. 259, 72 L. Ed. 446, 37 A. L. R. 1230, this Court approved both of the foregoing cases In that case, this Court had before it another statute which contained no provision for notifying the defendant and only required service upon the Secretary of State. This Court held in that case that such statute violated Section 1 of the Fourteenth Amendment of the United States as a denial of due process.

The requirement of Section 1 of the Fourteenth Amendment as to such statute is given by Chief Justice Taft, after citing numerous cases, as follows:

(72 L. Ed. at 451, 276 U. S. at 24)

"These cases and others indicate a general trend of authority towards sustaining the validity of service of process, if the statutory provisions in themselves indicate that there is a reasonable probability that if the statutes are complied with the defendant will receive actual notice, and that is the principle which we think should apply here."

(See also Syl. 2.)

The same rule has been reiterated by this Court in the case of *Henry L. Doherty & Co.* v. *Goodman*, 294 U. S. 623

at 628, 79 L. Ed. 1097, 55 S. Ct. 553, in the following language of the opinion:

> "The power of the states to impose terms upon nonresidents, as to activities within their borders, recently has been much discussed. *Hess* v. *Pawloski*, 274 U. S. 352; *Wuchter* v. *Pizzutti*, 276 U. S. 13; *Young* v. *Masci*, 289 U. S. 253 (77 L. Ed. 1158, 53 S. Ct. 599, 88 A. L. R. 170). Under these opinions it is established doctrine that a state may rightly direct that nonresidents who operate automobiles on her highways shall be deemed to have appointed the Secretary of State as agent to accept service of process, provided there is some 'provision making it reasonably probable that notice of the service on the Secretary will be communicated to the non-resident defendant who is sued.' "

Also in *Washington* v. *Superior Court of Washington*, 289 U. S. 361, 77 L. Ed. 1256, 53 S. Ct. 624, 89 A. L. R. 653

Appellants are claiming, quite contrary to the decisions of this Court, that it is a denial of due process unless the defendant receives actual notice This Court has held that its only concern has been the terms of the state statutes, that it is not necessary that the defendant receive actual notice, and that matter has made no difference under the decisions of this Court. In *Wuchter* v. *Pizzutti* (Syl. 4), the defendant received actual notice, but the Court held the statute invalid and the service void because the statute made no provision for any kind of notice to the defendant. In *Hess* v. *Pawloski*, no personal service was made on the defendant yet this Court held the statute valid because it contained a reasonable provision for notifying him.

The Ohio statutes contain provisions for notifying the defendant, which make it "reasonably probable" that the defendant will receive actual notice and therefore under the decisions of this Court do not violate Section 1 of the Fourteenth Amendment.

The Ohio Supreme Court carefully followed the decisions of this Court, and in that connection we respectfully refer this Court to the portions of the opinion of the Ohio Supreme Court, 144 O. S., 112 at pages 118 and 119. (Case No. 29705—August 9, 1944, P. 5 of copy of Opinion attached to Appellant's Jurisdictional Statement.)

There are many kinds of proper service in which the defendant may not receive actual notice and which meet the requirements of due process; for instance, ordinary residence service in an action in a court of a county in which defendant is a resident. Other instances are given by the Ohio Supreme Court in its opinion to which reference is respectively made for illustration, 144 O. S. at 119 and 120. (Case No. 29705—August 9, 1944, P. 5 and 6 of copy of Opinion attached to Appellant's Jurisdictional Statement.)

To hold, as contended by the defendant, that due process requires that the defendant receive actual notice, would deprive the statutes in question of all effectiveness and invite fraud. A defendant would need only refuse the mail or conceal his whereabouts and mailing address as the defendant did in this case. We fail to find any justification offered by appellant in its jurisdictional statement for its second and third assignments of error and therefore make no reference to the same.

It would seem that any question under the Fourteenth Amendment, either as respects the act or the proceedings, is foreclosed by previous decisions of this Court and is so unsubstantial and frivolous as to justify the motion to affirm, if not the motion to dismiss. *Leonard* v. *Vicksburg, etc., Railroad Co.*, 198 U. S. 416, 25 S. Ct. 750, 49 L. Ed. 1108 (Syl. 2); *Boston* v. *Jackson*, 260 U. S. 209, 43 S. Ct. 129, 67 L. Ed. 274—at 260 U. S. 314, 67 L. Ed. 282; *Equitable Life*

Assurance Co. v. *Brown*, 187 U. S. 308, 23 S. Ct. 123, 47 L. Ed. 190—187 U. S. 311, 47 L. Ed. 192; *King* v. *West Virginia*, 216 U. S. 92, 30 S. Ct. 225, 54 L. Ed. 396—at 216 U. S. 100, 54 L. Ed. 401.

Respectfully submitted,

JAMES M. HINTON,
Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 670

MOTORISTS MUTUAL INSURANCE COMPANY OF COLUMBUS, OHIO, A CORPORATION,

Appellant,

vs.

HARRY HENDERSHOT, ADMINISTRATOR OF THE ESTATE OF ANNA L. HENDERSHOT, DECEASED,

Appellee

MOTION TO DISMISS OR AFFIRM

Now comes the appellee, Harry Hendershot, Administrator of the Estate of Anna L. Hendershot, deceased, and moves to dismiss the appeal herein on the ground that the case presents no substantial Federal question, and further moves, if the motion to dismiss is not granted, that this Court affirm the decision of the Ohio Court on the ground that the questions on which the decision of this Court depends are so unsubstantial as to need no further argument, all as appears in the Statement of Grounds Making Against the Jurisdiction of this Court filed herewith.

Respectfully submitted,

JAMES M. HINTON,
Counsel.

No. 670. MOTORISTS MUTUAL INSURANCE CO. *v.* HENDERSHOT, ADMINISTRATOR. Appeal from the Supreme Court of Ohio. November 25, 1946. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Wilbur E. Benoy* for appellant. *James M. Hinton* for appellee. Reported below: 147 Ohio St. 111, 68 N. E. 2d 67.